

FEB 06 2004

Michael N. Milby, Clerk

BC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, et. al.,	§	CIVIL ACTION NO. 01-CV-3624
	§	AND CONSOLIDATED CASES
<i>Plaintiffs,</i>	§	
v.	§	
	§	
ENRON CORPORATION, et al.	§	
	§	
<i>Defendants.</i>	§	

PAMELA M. TITTLE, et al.,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
	§	CIVIL ACTION NO: H-01-3913
v.	§	AND CONSOLIDATED CASES
	§	
ENRON CORP., an Oregon	§	
Corporation, et al.,	§	
	§	
<i>Defendants.</i>	§	

SUPPLEMENT TO OUTSIDE DIRECTORS' MEMORANDUM
CONCERNING DISCOVERY OF EXAMINER TRANSCRIPTS

[This Document Relates to Civil Action No. 01-CV-3624, Instrument No. 1972]

Robin C. Gibbs
Kathy D. Patrick
Jean C. Frizzell
Michael K. Oldham
Aundrea K. Frieden
Brian T. Ross

ATTORNEYS FOR DEFENDANTS

Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan,
John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert Jaedicke,
Charles A. LeMaistre, Jerome Meyer, Frank Savage, John Wakeham,
Charls E. Walker, and Herbert S. Winokur, Jr.

1978

TO THE HONORABLE MELINDA HARMON:

The Outside Director Defendants filed, on February 2, 2004, their Memorandum Concerning Discovery of Examiner Transcripts that are in the custody of Enron, the Official Creditors' Committee and parties in the *Newby* and *Tittle* consolidated actions. The same day, the Examiner filed an important, related pleading in the Enron Bankruptcy case that raises additional reasons why these transcripts should be produced. *See* Supplemental Examiner Brief, attached hereto as Exhibit "1."¹

First, as in his original Motion, the Examiner confirms that both Enron and the Creditors' Committee have possession of all the Examiner Transcripts. *See* Supplemental Examiner Brief at 5 ("[A]ll of the materials sought by third-party requestors [with the exception of Examiner work-product and notes of counsel] are or will be available from sources other than the Enron Corp. Examiner, such as the Debtors [and] the Creditors' Committee . . ."), Exhibit "1" hereto.

Second, the Examiner attached to his brief a 22 page list of the over 200 witnesses deposed by his counsel, Alston & Bird. *See* Exhibit "A" to Supplemental Examiner Brief. In addition to providing concrete evidence of the breadth and relevance of the witnesses whose transcripts are at issue, the list of depositions reveals one additional, critical fact: The Creditors' Committee attended more than 150 of the Examiner's depositions. The vast majority of these depositions were taken after the Creditors' Committee had already filed their lawsuit² and were thus precluded from using Rule 2004 in their own right. The law is clear: "Once an actual adversary proceeding has been

¹ The Supplemental Examiner Brief is formally styled as the "Second Supplemental Brief in Support of Motion of Neal Batson, the Enron Corp. Examiner, With Respect to Certain Procedural Issues in Connection with the Termination of the Enron Corp. Examination."

² The Creditors' Committee action was filed on October 1, 2002.

initiated, the discovery devices provided for in Rules 7026-7037 . . . apply and Rule 2004 should not be used.” *In re Kipp*, 86 B.R. 490, 491 (W.D. Tex. 1988).³ See also Order on Outside Directors’ Motion for Protection from Rule 2004 Subpoenas, December 12, 2002 at 3 (“the filing of the [Creditors’ Committee’s] lawsuit has precluded the use of Rule 2004 discovery and subjected the creditors committee to the stay.”) (*Newby* Instrument No. 1184).⁴

That the Creditors’ Committee was able to use the Examiner’s Rule 2004 discovery to circumvent the effect of this rule, indeed the very fact that it was so deeply involved in the Examiner’s investigation, highlights why all parties (and not just the Creditors’ Committee) should be afforded an equal right to discover and use the Examiner Transcripts.

Conclusion

For the foregoing reasons, and for the reasons set forth in the Outside Directors’ previous Memorandum, this Court should allow all parties access to the Examiner Transcripts.

³ See also *In re Szadowski*, 198 B.R. 140, 141 (Bankr. D. Md. 1996) (“Once an adversary proceeding has commenced, . . . discovery may be had only pursuant to the discovery provisions of the Federal Rules of Civil Procedure.”); *Snyder v. Society Bank*, 181 B.R. 40, 41-42 (S.D. Tex. 1994), *aff’d* 52 F.3d 1067 (5th Cir. 1995) (affirming bankruptcy court’s refusal to compel compliance with Rule 2004 examination, where examination was sought to further examiner’s case against the examinee in Michigan state court); *In re French*, 145 B.R. 991, 992 (Bankr. D.S.D. 1992) (holding that a party “must pursue its course of action utilizing the discovery procedures available under the Federal Rules of Civil Procedure.”).

⁴ As a result of this Order, the Creditors’ Committee did not attend the Examiner’s depositions of any of the Outside Directors.

Respectfully submitted,

GIBBS & BRUNS, L.L.P.

By:  ^{upon permission} 

Robin C. Gibbs

State Bar No. 07853000

S.D. Tex. I.D. No. 4790

1100 Louisiana Street, Suite 5300

Houston, Texas 77002

Telephone: (713) 650-8805

Facsimile: (713) 750-0903

ATTORNEY-IN-CHARGE FOR DEFENDANTS

Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome J. Meyer, Frank Savage, John Wakeham, Charles E. Walker and Herbert S. Winokur, Jr.

OF COUNSEL:

GIBBS & BRUNS, L.L.P.

Kathy D. Patrick

State Bar No. 15581400

Jean C. Frizzell

State Bar No. 07484650

Aundrea K. Frieden

State Bar No. 24034468

Brian T. Ross

State Bar No. 24037395

1100 Louisiana Street, Suite 5300

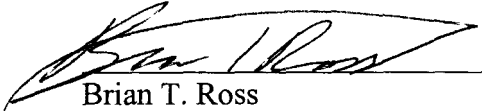
Houston, Texas 77002

Telephone: (713) 650-8805

Facsimile: (713) 750-0903

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on all counsel of record on this the 6th day of February, 2004, via posting to www.esl3624.com.


Brian T. Ross

The Exhibit(s) May
Be Viewed in the
Office of the Clerk